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No. 05-1272

IN THE

Supreme Court of the United States

ROCKWELL INTERNATIONAL CORP. AND BOEING NORTH AMERICAN, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA AND UNITED STATES OF AMERICA EX REL. JAMES S. STONE,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of business organizations.[1] It represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business.

This is such a case because the *qui tam* provisions of the 1986 False Claims Act ("FCA") threaten every federal government contractor, health care provider, and grant recipient in the United States. The Court should review this appeal for two reasons:

First, the circuits are split on how to interpret the "original source" jurisdictional requirement for *qui tam* suits, 31 U.S.C. § 3730(e)(4). The original source rule affords an important protection against the filing of unmeritorious or vexatious *qui tam* suits by relators who do not genuinely possess otherwise unknown factual information directly relating to submission of false claims against the Government.

Second, and even more fundamentally, the Court should grant review to resolve, at last, the constitutional

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[1] Pursuant to Sup. Ct. R. 37.6, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to Sup. Ct. R. 37.2, written consent to the filing of this brief has been obtained from counsel for Petitioners and Respondents, and the documents reflecting consent have been filed with the Clerk's office.

question that the Court explicitly reserved in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000): Whether the *qui tam* provisions, which vest self-appointed private relators with sweeping powers to initiate and conduct civil false claims litigation on behalf of the United States, violate the Appointments and Take Care Clauses of Article II of the Constitution. Because this is a threshold question underlying the entire *qui tam* scheme, the Chamber's *amicus* brief focuses on that issue and the reasons why the Court should grant certiorari to address it.

The *qui tam* provisions present a separation of powers question that directly implicates congressional encroachment of Executive Branch constitutional duties. It is a clearly defined, long debated, and fully mature issue which has been smoldering just below the surface of the more than 5,000 *qui tam* actions that have been filed since the current provisions were enacted two decades ago. During this period many Chamber members, especially those involved in defense procurement and the nation's health care system, have been subjected to a continuing barrage of *qui tam* suits brought by officious bounty hunters. In the vast majority of cases, the Department of Justice, following investigation, has declined to support the relators' fraud claims, which *qui tam* defendants nevertheless are forced to litigate or settle at substantial cost.

The Chamber has consistently contended, including in *amicus* briefs filed with this Court in *Stevens* and the Fifth Circuit in *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001), that the 1986 *qui tam* provisions are a blatant example of unconstitutional congressional interference with performance of Executive Branch responsibilities. The instant *qui tam* appeal, where the Department of Justice clearly exercised its prosecutorial discretion, initially declining to intervene and subsequently deciding to support only some of the relator's claims, presents an ideal vehicle

for resolving the Article II issue. Accordingly, the Chamber is submitting this brief to urge the Court to grant review.

SUMMARY OF ARGUMENT

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The FCA's *qui tam* provisions, 31 U.S.C. § 3730(b), represent a serious breach of the separation of powers. "The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the 'Courts of Law' or by 'the Heads of Departments' who are themselves Presidential appointees), Art. II, § 2." *Printz v. United States*, 521 U.S. 898, 922 (1997). By enacting the *qui tam* provisions, however, Congress has invaded Article II territory. It has impermissibly (i) seized, reassigned, and diffused the Executive Branch's Appointments power by allowing private relators essentially to appoint themselves as "Officers of the United States," and (ii) empowered such financially motivated *qui tam* relators (including disgruntled former employees proceeding in their own self interest) to obstruct or impair the Executive Branch's ability to "take Care" by vesting them with significant authority to prosecute, at their sole discretion, alleged false claims for, and in the name of, the United States, against any government contractors, health care providers, or grant recipients that they choose to target.

This Court has "not hesitated to strike down provisions of law . . . that undermine the authority and independence of one or another coordinate Branch,"

Mistretta, 488 U.S. at 382, especially where a federal statute "prevents the Executive Branch from accomplishing its constitutionally assigned functions," *id.* at 383 (internal quotation marks omitted). That is the case here. The *qui tam* provisions flout the Appointments Clause and undermine the Executive Branch prosecutorial discretion embodied in the Take Care Clause. The constitutionality of the *qui tam* provisions under Article II remains an important and unresolved question worthy of this Court's review, even under the lenient "sufficient control" criterion set forth in *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the now-expired independent counsel provisions of the Ethics in Government Act of 1978). Indeed, in 2000 the Court raised the *qui tam* Article II issue in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S at 778 n.8, but expressed no view on it, other than to rebuke the dissent's unsupported assertion that historical evidence of various types of *qui tam* actions in England and America somehow establishes that the substantially different 1986 FCA *qui tam* provisions can be reconciled with the Appointments and Take Care Clauses.

ARGUMENT

I. THE CONSTITUTIONALITY OF THE QUI TAM PROVISIONS UNDER ARTICLE II REMAINS AN OPEN QUESTION

This Court should resolve, once and for all, the enduring but fundamental question of whether the FCA's *qui tam* provisions, 31 U.S.C. § 3730(b), violate Article II of the Constitution, specifically the Appointments and Take Care Clauses. Six years ago, in *Stevens*, the Court explicitly reserved the Article II issue for consideration in an appropriate case. The *qui tam* provisions, and the voracious litigation industry that they have engendered, continue to present a real-world separation of powers issue that calls into

question Congress' ability to undermine Article II Executive Branch responsibilities however it deems expedient. As long as this Court allows to remain unchecked the FCA's brazen reassignment and diffusion of Executive Branch prosecutorial discretion to private, self-appointed, unsupervised, financially motivated *qui tam* relators, an emboldened Congress will continue to act as if Article I enables it to abrogate or alter the Executive Branch's clearly delineated Article II powers, duties, and prerogatives.

In *Stevens* the Court held, based in part on "the long tradition of *qui tam* actions in England and the American Colonies . . . history [that] is particularly relevant to the constitutional standing inquiry," 529 U.S. at 774, that *qui tam* relators have Article III standing under the FCA. Writing for the majority, however, Justice Scalia not only acknowledged the separate Article II question, but also specifically saved it for another day. *Id.* at 778 n.8 ("In so concluding, we express no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the 'take Care' Clause of § 3."). He noted that in *Stevens*, in which the *qui tam* relator alleged submission of false claims by a state agency to a federal agency (a type of *qui tam* suit which the Court held cannot be maintained under the statute), "Petitioner does not challenge the *qui tam* mechanism under either of those [Article II] provisions, nor is the validity of *qui tam* suits under those provisions a jurisdictional issue that we must resolve here." *Ibid.*

To make it very clear that the Article II question remained open, the *Stevens* Court, *ibid.*, chided the dissent for "proceed[ing] to volunteer an answer," *see id.* at 801 (Stevens, J., dissenting) (asserting that "[t]he historical evidence summarized by the Court . . . together with the evidence that private prosecutions were commonplace in the 19th century . . . is also sufficient to resolve the Article II question"). *See Riley v. St. Luke's Episcopal Hosp.*, 252

F.3d 749, 770 (5th Cir. 2001) (en banc) (Smith, J., dissenting) (the "majority in *Stevens* expressly disclaimed any view with regard to Article II challenges . . . the fact that the majority in *Stevens* took pains to point out that it was not deciding the constitutionality of *qui tam* suits under Article II suggests strongly that the Court did not think this issue is easily decided by history."); Pet. App. 24a ("The *Stevens* Court . . . was careful to specify that it was expressing no opinion concerning other constitutional challenges to *qui tam* actions, namely whether they violate the Take Care and Appointments Clauses of Article II.").

Neither of the post-*Stevens* court of appeals opinions that address the Article II issue illuminate the subject in a way that mitigates the continuing need for this Court to decide the question. In *Riley*, a *qui tam* action against health care providers, a divided Fifth Circuit panel originally held that the *qui tam* provisions do violate the Take Care Clause and the separation of powers doctrine. *See* 196 F.3d 514, 530 (5th Cir. 1999).[2] But on rehearing, a divided en banc court of appeals, despite the *Stevens* majority's admonition, repeatedly relied upon the conclusory dictum in the *Stevens* dissent in holding that the *qui tam* provisions do not violate Article II. *See Riley*, 252 F.3d at 752-53. ("[T]he dissent in *Stevens* noted that history alone resolves the question of whether the qui tam provisions in the FCA violate Article II."); *id.* at 758 n.13 ("The dissent in *Stevens* plainly stated that the FCA's qui tam provisions do not violate the Appointments Clause.").

In holding that the *qui tam* provisions do not represent an "unconstitutional intrusion" of "the constitutional separation of powers doctrine under the Take Care and Appointments Clauses of Article II," *id.* at 751, the

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[2] The panel did not reach the Appointments Clause question. *See Riley*, 196 F.3d at 531.

en banc majority in *Riley* asserted "it is logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question concerning this statute." *Id.* at 752. Judge Smith (joined by Judge DeMoss) wrote a comprehensive dissent to the en banc opinion. He explained that "[t]he Article II issues raised by the FCA, however, were not so easily disposed of by history, and thus the majority did not address them in *Stevens*." *Id.* at 772. "[T]he nature of the standing inquiry dictates that special attention be paid to historical practice. Such extreme deference need not be given, by contrast, within the context of Article II challenges." *Ibid.*[3]

The other post-*Stevens* court of appeals decision on Article II is the Tenth Circuit's opinion below. The court relied upon *Riley*, and also the two pre-*Stevens* court of appeals decisions which found no Article II violation. *See* Pet. App. 26a, 28-29a (discussing *Riley*; *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993)). But this Court's doctrinal-based rationale in *Stevens* for holding that *qui tam* relators have Article III standing—that "[t]he FCA can reasonably be regarded as effecting a *partial* assignment of the Government's damages claims," 529 U.S. at 773 (emphasis added)—casts substantial doubt upon the Article II analyses in *Taxpayers Against Fraud* and *Kelly*. Those

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[3] Judge Smith observed, based on a Supreme Court case "which was decided just four months before *Stevens*," that "Justice Scalia, the author of the majority opinion in *Stevens*, and Justice Thomas and perhaps Justice Kennedy, seem to have reservations as to the constitutionality of *qui tam* actions under Article II." *Riley*, 252 F.3d at 770 (Smith, J., dissenting).

analyses are predicated upon the notion, subsequently rejected in *Stevens*, that the *qui tam* provisions do not vest relators with governmental power. *See Taxpayers Against Fraud*, 41 F.3d at 1041 ("Although a relator may sue in the government's name, the relator is not vested with governmental power."); *Kelly*, 9 F.3d at 758 ("The fact that relators sue in the name of the government does not vest them with any governmental powers. . . ."). Judge Smith's dissenting opinion in *Riley* elaborates upon this conflict with *Stevens*:

> [T]here can be no mistake that, in the wake of *Stevens*, a relator is litigating on behalf of the government, because *Stevens* explicitly states that a relator is only a *partial* assignee, and accordingly, the part of the claim the relator is not litigating for himself he is litigating for the government. . . . [E]ven though the government signs over to the relator sufficient partial interest in the litigation to qualify for Article III standing, the majority interest that is not signed over--and therefore still owned by the government--must be prosecuted by an officer of the United States under the Appointments Clause, and must be faithfully managed by the Executive under the Take Care Clause.

Riley, 252 F.3d at 772 (Smith, J., dissenting).

Thus, the court of appeals decisions rejecting Article II challenges to the FCA's *qui tam* provisions, both before and after the *Stevens* majority earmarked the issue for future consideration by this Court, do not comprise a coherent or cogent body of precedent, but instead actually reflect a longstanding debate among lower court jurists.[4] Indeed, the

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[4] Legal scholars and commentators also continue to debate the Article II issue. *See, e.g.*, Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 Wis. L. Rev. 381, 384 (2001) ("Despite

(footnote continued on next page)

question of whether the 1986 *qui tam* provisions violate Article II has been percolating at least since July 1989, when the Department of Justice's Office of Legal Counsel prepared a formal Memorandum Opinion for the Attorney General which argued—in remarkably emphatic terms—that the *qui tam* provisions are unconstitutional. Assistant Attorney General William P. Barr's Memorandum stated, for example, as follows:

> [Q]ui tam suits pose a *devastating threat to the Executive's constitutional authority and to the doctrine of separation of powers.* If qui tam suits are

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(footnote continued from previous page)

the FCA's long history, its constitutionality is still open to question."); James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 Harv. J.L. & Pub. Pol'y 701 (1993) (scrutinizing the various arguments relied upon by district courts and academics to uphold the constitutionality of the qui tam provisions and concluding that none of these arguments adequately address the constitutional problems that the provision presents); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 348 (1989) (identifying "the constitutional values potentially threatened by the qui tam device" and "analyzing the validity and persuasive force of the arguments they inspire"); Robert E. Johnston, Note, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 Geo. Wash. L. Rev. 609 (1994) (arguing that even qui tam suits brought by executive-branch employees are unconstitutional); Ara Lovitt, Note, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 Stan. L. Rev. 853, 853 (1997) ("[T]he qui tam provisions of the False Claims Act, which allow private citizens to litigate on behalf of the United States, violate the separation of powers by interfering with the Executive Branch's authority to 'take Care that the Laws be faithfully Executed.'"); *see also* 1 John T. Boese, Civil False Claims and *Qui Tam* Actions § 4.12 (3d ed. 2006) ("Constitutionality Of The Relator's Role").

> upheld, it would mean Congress will have carte blanche to divest the executive branch of its constitutional authority to enforce the laws and vest that authority in its own corps of private bounty hunters.
>
> * * *
>
> The Office of Legal Counsel believes that the qui tam provisions of the False Claims Act are patently unconstitutional. In our view, *this is not even a close question.*

Constitutionality of the Qui Tam Provisions of the False Claims Act ("Barr Mem."), 13 U.S. Op. Off. Legal Counsel 207, 208-209 (1989), 1989 WL 595854. Although Assistant Attorney General Barr unequivocally opined, only three years after enactment of the 1986 Amendments, "that qui tam suits brought by private parties to enforce the claims of the United States plainly violate the Appointments Clause of the Constitution," *id.* at 221, one of his successors in the Office of Legal Counsel, Assistant Attorney General Walter Dellinger, in a 1996 Memorandum Opinion for the General Counsels of the Federal Government, "disapprove[d] the Appointments Clause analysis and conclusion of an earlier opinion of this Office." *The Constitutional Separation of Powers Between the President and Congress*, 20 U.S. Op. Off. Legal Counsel 124, 146 n.65 (1996), 1996 WL 876050.

The Department of Justice, by opposing Supreme Court review and defending the constitutionality of the *qui tam* provisions under Article II, is in the odd position of supporting the unabated erosion of its own constitutionally based prosecutorial discretion. This is far more troublesome than mere advocacy of a bizarre litigation position; it represents an attempt by the Executive Branch to condone Congress' breach of the separation of powers, namely congressional tampering with the Executive Branch's Article II duties under the Appointments and Take Care Clauses. By arguing that the *qui tam* provisions pass Article II muster, the

Justice Department (i.e., Executive Branch) in effect is attempting to cede its own prosecutorial duties to Congress, which has simultaneously arrogated and reassigned those duties to private, self-appointed, *qui tam* relators, whom the statute affords virtually unfettered discretion to sue on behalf of the United States. The Court should not permit such a blatant violation of the separation of powers to persist any longer. As Justice Kennedy explained,

> [t]o say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. . . . The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers.

Clinton v. City of New York, 524 U.S. 417, 449-50 (1998). (Kennedy, J., concurring) (internal citations omitted).

If the 1986 *qui tam* provisions violate Article II, then 20 years of unconstitutional litigation (primarily against government contractors and health care providers) is enough. Between Fiscal Years 1987 and 2005, more than 5,100 *qui tam* cases were filed, and the number of *qui tam* cases has continued to increase as a proportion of total FCA cases. *See* U.S. Gov. Accountability Office, *Information on False Claims Act Litigation* 25 (2006). But the Justice Department has elected to pursue only a small percentage of *qui tam* suits. *Id.* at 29. Sums recovered in cases where the Department declined to intervene represent less than 5% of recoveries from all *qui tam* suits and less than 3% of total FCA recoveries. *Id.* at 1, 5, 35. In his dissenting opinion in *Riley*, Judge Smith, who analyzed *qui tam* statistics, concluded that the "figures show that the cases in which the

government declines to intervene are generally the meritless cases." *Riley*, 252 F.3d at 767 n.24 (Smith, J., dissenting). Thus, any suggestion that a finding of unconstitutionality "would result in the disablement of an effective law enforcement tool is utterly without support." *Ibid.* The fact that "[i]n many instances, the costs of defending against unsuccessful *qui tam* suits are recoverable against the government" under various contract clauses further diminishes whatever economic benefit the Government derives from the majority of *qui tam* suits. William E. Kovacic, *The Civil False Claims Act As A Deterrent To Participation In Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 201 (1998). Yet, the filing of *qui tam* suits, including frivolous or otherwise unmeritorious suits that defendants settle to avoid harassment, adverse publicity, strained relations with the Government, and litigation burdens and costs, remains a lucrative business: Between 1986 and 2005, more than $1.6 billion was awarded to *qui tam* relators and their attorneys. GAO at 5.

The 20-year old Article II issue surely requires no further percolation. This Court should grant review and use this case, which squarely presents the Article II question, as the vehicle for completing the *qui tam* constitutional analysis that it began six years ago in *Stevens*. Unlike other *qui tam* appeals, where the United States chose not to intervene at all,[5] here the Government, following investigation, initially declined to intervene, but then based on information discovered in a separate case, elected to intervene only to support *certain* of Respondent Stone's claims. *See* Pet. at 3-4. The carefully considered, *selective* exercise of

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[5] *See, e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994); *GPM Gas Corp. v. Grynberg*, 277 F.3d 1373 (5th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002).

prosecutorial discretion embodied by the Government's actions in this case only underscores the question of whether Congress, through enactment of the *qui tam* provisions, has impermissibly encroached upon Executive Branch duties and prerogatives regarding conduct of litigation on behalf of the United States.[6]

II. THE QUI TAM PROVISIONS PRESENT SUBSTANTIAL ARTICLE II ISSUES WORTHY OF THIS COURT'S REVIEW

In reserving the question of whether the FCA's *qui tam* provisions violate the Article II Appointments and Take Care Clauses, this Court's *Stevens* majority was careful to avoid even an implicit endorsement of the dissent's facile assertion that "historical evidence," such as "evidence that private prosecutions were commonplace in the 19th century," is "sufficient to resolve the Article II question." 529 U.S. at 801 (Stevens, J., dissenting). As Justice Scalia cautioned, "[i]t is *only the dissent* that proceeds to volunteer an answer." *Id.* at 778 n.8 (emphasis added).

In his *Riley* dissent, Judge Smith discussed at length why, unlike the issue of Article III standing addressed in *Stevens*, where this Court focused on the historical meaning of "Cases and Controversies," 529 U.S. at 774, "history is

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[6] The lower court was "not persuaded that in the circumstances of this case, the separation of powers, as embodied in the Take Care Clause, has been transgressed." Pet. App. 27a. But the court's analysis is based on the erroneous premise that "the Government was a full and active participant in the litigation as it jointly prosecuted the case with Stone." *Ibid.* The court of appeals skirted the question of whether there is an Article II violation where, as actually happened here, a relator prosecutes at least some of his claims without the Government's active participation or support.

not controlling" on the separate Article II question. *Riley*, 252 F.3d at 772 (Smith, J., dissenting). For example, he noted that "at the time the first *qui tam* acts were passed, the executive was in its infancy . . . . Thus, the exigencies of a weak Executive led Congress to pass a number of *qui tam* acts." *Id.* at 774. "[T]he encroachment on the Executive was less than it is today, because the Executive now exists as a robust branch that could prosecute the claims be[en] given to relators by the FCA." *Id.* at 775 n.38. *See also* Barr Mem. at 232 ("History cannot save qui tam"); *id.* at 237 ("Congress's aggrandizing enactments should not serve as conclusive precedent on the scope of Congress's own authority.").

In its opinion below, the Tenth Circuit, although relying upon *Riley*, appears to have abandoned any attempt at a history-based rationale for upholding the *qui tam* provisions under Article II. Nevertheless, the lower court's Appointments Clause and Take Care Clause analyses are circular and unconvincing, and they only underscore the need for this Court's review.

1. **Appointments Clause**, U.S. Const., Art. II, § 2, cl. 2. Writing for the Court in *Edmund v. United States*, 520 U.S. 651, 659 (1997), Justice Scalia emphasized that "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag v. Comm'r of IRS*, 501 U.S. 868, 878 (1991)).

In *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976), the Court explained "that the term 'Officers of the United States' as used in Art. II . . . is a term intended to have *substantive meaning*" (emphasis added). "[I]ts fair import is that any

appointee *exercising significant authority* pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of that Article." *Id.* at 126 (emphasis added); *see also Edmund*, 520 U.S. at 662 ("The exercise of 'significant authority pursuant to the laws of the United States' marks . . . the line between officer and nonofficer") (quoting *Buckley*).

The Court held in *Buckley* that "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights . . . may be discharged only by persons who are 'Officers of the United States' within the language" of the Appointments Clause. 424 U.S. at 140. The FCA's *qui tam* provisions violate the Appointments Clause because they empower private relators, who have not been appointed by the Executive Branch (or any other Branch), to function as "Officers of the United States" by "exercising significant authority pursuant to the laws of the United States," *id.* at 126, specifically the "primary responsibility" for conducting litigation on behalf of the United States, *id.* at 140.[7]

The statute provides that "[a] person may bring a civil action for a [FCA] violation . . . for the United States Government," and "[t]he action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1) ("Actions by private persons"). *See also Stevens*, 529 U.S. at 774 n.4 (noting that "a *qui tam* relator is, in effect, suing as a *partial*

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[7] Self-appointed *qui tam* relators are not appointed by any branch of the Government. Thus, the FCA does not provide for the type of limited "interbranch appointments" which the Court countenanced in *Morrison v. Olson*, 487 U.S. 654, 675 (1988). Moreover, Appointments Clause violations are not predicated on whether Congress has arrogated Executive Branch power to itself. *See Freytag v. Comm'r of IRS*, 501 U.S. at 878.

assignee of the United States"). Regardless of whether the Government intervenes, the *awesome* power that the FCA assigns to *any* person who chooses to commence a *qui tam* action "for" and "in the name of" the United States represents, in and of itself, a serious violation of the Appointments Clause (and the Take Care Clause too). Further, "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). Even if the Government intervenes as to some or all claims, the relator continues to act as a party with significant rights. *Id.* § 3730(c)(1), (2). Here, Respondent Stone effectively led the litigation, not only during the six year period prior to the Government's intervention, but also after the Government intervened to support some, but not all, of Stone's claims. *See* Pet. at 25. "There can be no doubt that qui tam relators are exercising significant governmental power . . . to level fraud charges against other private citizens and hail them into court to answer to these alleged public offenses, with the possibility of collecting not only damages but substantial civil penalties." Barr Mem. at 222.

The lower court's circular holding that *qui tam* relators are not "'officers' for purposes of Article II" because they "do not serve in any office of the United States" not only begs the question of whether they are officers, but also trivializes the Appointments Clause. Pet. App. 25a. Rather than heeding this Court's admonition to give the term "Officers of the United States" its intended "substantive meaning," *Buckley*, 424 U.S. at 126, and not limit the term to the ancient formalistic definition provided in *United States v. Germaine*, 99 U.S. 508, 509-510 (1879), the court of appeals, did precisely the latter. Relying upon *Germaine* and *Aufmordt v. Hedden*, 137 U.S. 310 (1890), the court elevated form over substance, focusing, for example, on the fact that relators "are not entitled to the benefits of officeholders, such as drawing a government salary." Pet.

App. 25a. The Fifth Circuit's opinion in *Riley*, 252 F.3d at 757-58, suffers from the same faulty logic.

"The Court has twice held . . . that persons litigating on behalf of the United States are officers of the United States." *Riley*, 252 F.3d at 768 (citing *Buckley*, 424 U.S. at 113, 140; *Morrison*, 487 U.S. at 671 n.12). Because the statute vests *qui tam* relators with significant authority to initiate, conduct, and settle civil FCA litigation on behalf of the United States, they are "Officers of the United States" within the Framers' intended substantive meaning of that term. As a result, the *qui tam* provisions violate the Appointments Clause because they enable relators to appoint themselves to act as Government officers with broad prosecutorial authority. Further, as in *Riley*, the lower court here "ignores . . . the question that logically follows its conclusion that relators are not officers: whether non-officers may prosecute claims owned by the United States." *Id.* at 767 (Smith, J., dissenting). "Supreme Court precedent makes it plain that the answer to this question is no." *Id.* at 768.

2. **Take Care Clause,** U.S. Const., Art. II, § 3. The exercise of prosecutorial discretion to enforce the laws of the United States is an Executive Branch function inherent in the Take Care Clause. *See Buckley*, 424 U.S. at 138 ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"). In *Morrison v. Olson*, 487 U.S. at 696, the Court held that in order to avoid violation of the Take Care Clause, a statute divesting the Executive Branch of some measure of prosecutorial discretion must "give the Executive Branch sufficient control . . . to ensure that the President is able to perform his constitutionally assigned duties."

As Petitioners explain, none of the statutory safeguards which the *Morrison* majority held gave the

Attorney General "sufficient control" over court-appointed independent counsels, are present in the FCA *qui tam* relator provisions. *See* Pet. at 29. "Qui tam is far more dangerous: there is simply no way to cage this beast." Barr Mem. at 211. One highly significant difference with the independent counsel provisions considered in *Morrison*, is that *qui tam* relators are private, self-appointed individuals, who function as Officers of the United States even though their interests do not necessarily coincide with those of the Government. This Court has noted that "[a]s a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (holding that 1986 FCA Amendments do not apply retroactively).

As a result, *qui tam* relators frequently commence litigation "for the United States Government," and "in the name of the Government," 31 U.S.C. § 3730(b)(1), which the Government itself, in exercising its Article II prosecutorial discretion, either would not commence, or continue to pursue, for any number of reasons, including of course, lack of merit. Nevertheless, for reasons unrelated to the "public good," *qui tam* relators can vigorously pursue their statutory "right to conduct the action," *id.* §§ 3730(b)(4)(B), 3730(c)(3), such as by exacting a substantial monetary settlement from the defendant (including a tempting 15%—30% bounty for the relator and his attorney). And if the Government, following investigation, intervenes and then seeks dismissal or settlement, *qui tam* relators can object, *id.* §§ 3730(c)(2)(A), (B), and seek court approval to proceed with prosecution of the action. *See* Barr Mem. at 216-220 (discussing the statute's adverse impact on the Government's enforcement role).

This private FCA enforcement scheme, which Congress enacted to pressure the Executive Branch because

it was dissatisfied with that Branch's pursuit of defense contractor fraud during the 1980s, *see* Pet. at 29-30, has been repeatedly abused by the very individuals to whom Congress has entrusted and transferred the Executive Branch's prosecutorial discretion. The principal harm to the Government, industry, and the public is the pursuit of frivolous or unmeritorious, and sometimes vexatious, *qui tam* suits, especially after the Government (the Department of Justice and/or Department of Defense or other supposedly defrauded agency) determines that there has been no misconduct. *See, e.g., Hughes Aircraft Co.*, 520 U.S. at 943 n.1 (noting that the Government ultimately reversed its preliminary determination that it had been improperly charged and concluded that the defense contractor defendant "actually benefited" the Government financially); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402 (9th Cir. 1995) (affirming dismissal of *qui tam* suit against defense contractor where, based in part on trial testimony of numerous Air Force witnesses, the quality of defendant's drawings met its contractual obligations and the Air Force's expectations). *See generally* Kovacic, *supra* at 232 ("That the purchasing agencies or the Department of Justice regard such a suit as ill-conceived does not impede the initiation and prosecution of such cases by relators.").

To say the least, unmeritorious *qui tam* actions "waste defendants' and the courts' resources," as well as those of the Justice Department. Statement of Stuart M. Gerson, Assistant Attorney General, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong. 20 (1992). Because "[r]elators who have no interest in the smooth execution of the Government's work have a strong dollar stake in alleging fraud whether or not it exists," Barr Mem. at 220, unwarranted *qui tam* actions also can have a chilling effect on the working relationships between Government agencies and their contractors. *See* Kovacic, *supra* at 239 (*qui tam*

provisions are "a serious impediment"). The Tenth Circuit's expansive interpretation of the statute's "original source" jurisdictional requirement only opens the floodgates wider.

Here, because the Government eventually intervened, the Tenth Circuit was unconvinced "that the presence of a *qui tam* relator in the litigation so hindered the Government's prosecutorial discretion as to deprive the Government of its ability to perform its constitutionally assigned responsibilities." Pet. App. 27a. In so concluding, the court of appeals mistakenly assumed that once the Government intervenes, the relator has no significant continuing role to play in the litigation. That is neither true in general nor in this case, especially since the Government, exercising its prosecutorial discretion, declined to support certain of Respondent Stone's claims, which he continues to pursue on his own. As indicated above, *supra* n.6, the lower court, although purporting to address the circumstances of this case, made no effort to defend the constitutionality of the *qui tam* provisions under the Take Care Clause where the Government exercises its discretion to support some but not all of the relator's claims. Stone's right under the FCA *qui tam* provisions to pursue the very claims which the Government carefully considered and then declined to support dramatically highlights the statute's Article II infirmities. The Article II *qui tam* question is not "clad, so to speak, in sheep's clothing . . . this wolf comes as a wolf," *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting), and it continues to cry out for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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